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# The Strife of Riley: The Search-Incident Consequences of Making an Easy Case Simple

Leslie A. Shoebbotham

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## The Strife of *Riley*: The Search-Incident Consequences of Making an Easy Case Simple

Leslie A. Shoebbotham\*

### ABSTRACT

*In Riley v. California, the U.S. Supreme Court held that the Fourth Amendment requires police officers to obtain a warrant before searching an arrestee's cellular phone in a search incident to a lawful arrest. The lauded decision heralds the modernization of the Fourth Amendment to embrace privacy in the digital age. But Riley's reasoning contains a flaw that only Justice Alito recognized. Evidence gathering—i.e., the need to look for evidence of the arrestee's crime for use at trial—has long justified law enforcement's authority to perform incident searches. Indeed, evidence-gathering searches incident to arrest were recognized as legitimate searches over a century before the adoption of the Fourth Amendment. The Riley Court ignored this pedigree, however. Despite the doctrine's centuries-long history, Riley concluded that the authority to search incident to arrest was defined by a trilogy of cases—California v. Chimel, United States v. Robinson, and Arizona v. Gant—cases that date back only to 1969. Based on the Chimel line, Riley concluded that the justifications for performing an incident search were limited to officer safety and preventing the destruction of evidence. And the only evidence-gathering incident search that Riley recognized was based on Gant; an incident search of the passenger compartment of an arrestee's vehicle that Riley justified solely on the “unique circumstances” involved in the automobile context, not the search-incident doctrine's historical evidence-gathering basis. Therein lies the concern. By ignoring the doctrine's evidence-gathering history, Riley has reorganized the search-incident doctrine into a rigid Chimel-based rule that just so happens to have a vehicle exception.*

*This Article amplifies Justice Alito's admonition that evidence gathering must be recognized as a legitimate justification for police to search incident to arrest. This Article addresses the consequences of Riley's digital-age reboot of the search-incident doctrine, especially Riley's limitation of Gant to the vehicle context—a restriction that was, ironically enough, not necessary for imposing*

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\* Victor H. Schiro Professor of Law, Loyola University New Orleans College of Law; LL.M., Tulane University School of Law; J.D., University of Houston Law Center; B.S.N., University of Texas Medical Branch. I would like to thank my research assistants, Andrea Jones and H. Rick Yelton, for their excellent research skills in preparing this Article.

*a warrant requirement on cell phone searches. Rather than relying solely on Chimel's two "concerns," this Article argues that the search-incident doctrine has been supported—both before and after Chimel—by three justifications: officer safety, preservation of evidence, and importantly, the need to discover evidence of the crime of arrest. Without evidence gathering as an implicit justification in a properly limited search incident to arrest, Riley's limitation of Gant calls into doubt law enforcement's authority to perform an incident search of an arrestee's reaching distance—a Chimel search—to look for evidence of the arrestee's crime once the arrestee has been handcuffed and is adequately secured. All things considered, Riley represents much more than a common-sense warrant requirement for cell phone searches. Riley is the deceptively simple beginning of the end of evidence gathering as a justification in a properly limited search incident to arrest.*

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## INTRODUCTION

*Lurking behind this issue [of warrantless searches of cell phones incident to arrest] is the question whether and when a laptop or desktop computer, [or] tablet . . . can be searched without a warrant—for a modern cell phone is a computer.<sup>1</sup>*

Americans love their gadgets. As technology has made electronic devices more portable, Americans increasingly carry with them devices that provide access to their most private information, both financial and personal.<sup>2</sup> That people carry cellular phones is a self-evident truth. Advances in technology have meant that modern cell phones do much more than make phone calls, however. So-called “smart phones,” such as Droid, Galaxy, and iPhone, provide advanced computing capabilities to their users, including Internet access.<sup>3</sup> The storage capability of such devices is vast.<sup>4</sup> Built-in apps and downloadable third-party apps allow people to perform a myriad of tasks—everything from playing Angry Birds<sup>5</sup> to accessing live video of the interior of their

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1. United States v. Flores-Lopez, 670 F.3d 803, 804 (2012).

2. Cf. City of Ontario, California v. Quon, 560 U.S. 746, 760 (2010) (“Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.”).

3. PCMag.com’s online encyclopedia defines a smart phone as:

A cellular telephone with built-in applications and Internet access. In addition to digital voice service, modern smartphones provide text messaging, e-mail, Web browsing, still and video cameras, MP3 player and video playback and calling. In addition to their built-in functions, smartphones run myriad free and paid applications, turning the once single-minded cellphone into a mobile personal computer.

*Definition of: Smartphone*, PCMAG.COM, <http://www.pcmag.com/encyclopedia/term/51537/smartphone>, archived at <http://perma.cc/FAT5-DA34> (last visited Sept. 7, 2014).

4. Apple’s iPhone 5, for example, comes with up to 64 gigabytes of storage. See *Tech Specs*, APPLE, <http://www.apple.com/iphone-5s/specs/>, archived at <http://perma.cc/7EMD-AZ72> (last visited Sept. 7, 2014). This device’s storage capacity is equivalent to about “four million pages of Microsoft Word documents.” See Charles E. MacLean, *But, Your Honor, a Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 38, 42 (2012) (“A cell phone with just one gigabyte of memory can store over 64,000 pages of Microsoft Word text, or over 100,000 pages of e-mails, or over 675,000 pages of text files.”).

5. Rovio Entm’t Ltd., *Angry Birds*, APPLE, <https://itunes.apple.com/us/app/angry-birds/id343200656?mt=8>, archived at <http://perma.cc/Q6MM-5YA8> (last visited Sept. 7, 2014) (describing strategy of game as: “The survival of the Angry Birds is at stake. Dish out revenge on the greedy pigs who stole their eggs”).

homes.<sup>6</sup> As the United States First Circuit Court of Appeals observed in *United States v. Wurie*: “In short, individuals today store much more personal information on their cell phones than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers . . . .”<sup>7</sup> Although password protection of cell phones and portable electronic devices provides some measure of protection for the phone or device’s stored data, that protection is technological, not constitutional.<sup>8</sup> Without protection from the United States Supreme Court, an incident search of even a password-protected cellular phone was likely already technologically feasible for law enforcement to perform.<sup>9</sup>

Against this backdrop, prior to *Riley v. California*<sup>10</sup> most courts ignored the privacy implications of cell phone searches and,

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6. SKJM, LLC, *iCam – Webcam Video Streaming*, APPLE, <https://itunes.apple.com/us/app/icam-webcam-video-streaming/id296273730?mt=8>, archived at <http://perma.cc/BD9T-TYNM> (last visited Sept. 7, 2014). In *United States v. Flores-Lopez*, Judge Posner, writing for a panel of the Seventh Circuit, used this particular downloadable app to illustrate how intrusive a warrantless cell phone search could be—by providing police with the functional equivalent to physical entry into the cell phone owner’s home. See 670 F.3d 803, 806 (7th Cir. 2012) (“At the touch of a button a cell phone search becomes a house search . . .”).

7. *United States v. Wurie*, 728 F.3d 1, 8 (1st Cir. 2013), *aff’d*, *Riley v. California*, 134 S. Ct. 2473 (2014).

8. See generally Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone From a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1174 (2011) (discussing password protection issues under Fourth and Fifth Amendments, and concluding that “[a]s a legal matter, password protecting the phone provides virtually no additional protection against police searches of cell phones incident to arrest”).

9. See, e.g., *What is XRY?*, MICRO SYSTEMATION, <http://www.msab.com/xry/what-is-xry>, archived at <http://perma.cc/VD64-MFUV> (last visited Sept. 7, 2014) (“XRY is a software application designed to run on the Windows operating system which allows you to perform a secure forensic extraction of data from a wide variety of mobile devices, such as smartphones, gps navigation units, 3G modems, portable music players and the latest tablet processors such as the iPad.”); *XRY Field Version*, MICRO SYSTEMATION, <http://www.msab.com/xry/field-version>, archived at <http://perma.cc/9FJB-NLC6> (last visited Sept. 7, 2014) (“The Field Versions [of the XRY program] incorporate . . . hardware and software combined to perform a complete and rapid analysis for the vast majority of mobile devices available today.”).

10. 134 S. Ct. 2473 (2014). *Riley* involved two cases that were consolidated for the Court’s consideration because both raised the question of “whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.” *Id.* at 2480. Compare *Wurie*, 728 F.3d at 13 (articulating categorical rule prohibiting cell phone searches incident to arrest), with *People v. Riley*, No. D059840, 2013 WL 475242 (Cal. Ct. App. Feb. 8, 2013) (upholding incident search of defendant’s cellular phone because phone was found on his person in search incident to arrest), *rev’d and remanded by Riley*, 134 S. Ct. 2473.

instead, relied on the Court's bright-line search-incident rules to uphold warrantless searches of arrestees' cellular phones.<sup>11</sup> Based on these courts' interpretations of the search-incident doctrine, police were entitled to peruse high-privacy electronic devices like cellular phones, regardless of the phone owner's crime of arrest. Therefore, police treated the arrestee's cellular phone as simply another "container" that could be "opened"—scrolled through—during a search incident to arrest, in the same way that conventional containers, like pill bottles, were routinely opened.<sup>12</sup> In *Riley*, the Court was called upon to address a split that had arisen between courts that imposed a categorical warrant requirement on incident searches of cellular phones and courts that supported a bright-line rule permitting warrantless cell phone searches if the phone was found on the arrestee's person in a search incident to arrest.<sup>13</sup>

*Riley* established a bright-line rule prohibiting warrantless cell phone searches in all but exigent circumstances,<sup>14</sup> eschewing an approach that would have allowed courts to determine the admissibility of cell phone data by performing a case-specific

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11. See, e.g., *Flores-Lopez*, 670 F.3d at 803–10 (upholding warrantless cell phone search incident to defendant's arrest for drug trafficking because search of phone—which was limited to obtaining phone's own telephone number—was minimally intrusive and the need to preserve phone's evidence could not be completely ruled out); *United States v. Curtis*, 635 F.3d 704, 711–13 (5th Cir. 2011) (upholding warrantless incident search of phone on which arrestee was talking when police stopped his vehicle); *Silvan W. v. Briggs*, 309 F. App'x 216, 225 (10th Cir. 2009) (upholding warrantless incident search of cellular phone found on arrestee's person); *United States v. Murphy*, 552 F.3d 405, 411–12 (4th Cir. 2009) (rejecting defendant's argument that warrantless incident searches of cellular phones be limited to phones that have "small storage capacity").

12. Cf. *Riley*, 134 S. Ct. at 2484 (acknowledging that a "mechanical application" of *United States v. Robinson*'s bright-line search-incident rule "might well support the warrantless [cell phone] searches at issue here"); see also *United States v. Robinson*, 414 U.S. 218 (1973).

13. See *Riley*, 134 S. Ct. at 2480; see also *supra* note 10. Although *Riley* considered the validity of warrantless cell phone searches, some lower courts upheld warrantless incident searches of other portable electronic devices including digital cameras, laptop computers, iPods, and tablets—if the device was found on the arrestee's person in a search incident to arrest. See generally *In re Alfredo C.*, No. B225715, 2011 WL 4582325, at \*1–3 (Cal. Ct. App. Oct. 5, 2011) (upholding incident search of digital camera found on arrestee's person in search incident to arrest).

14. *Riley*, 134 S. Ct. at 2485, 2487 (holding that "officers must generally secure a warrant before conducting [a cell phone] search" but could rely on exigent circumstances to immediately search an arrestee's phone if police were "truly confronted with a now or never situation" (internal quotation marks omitted)).

balancing of interests.<sup>15</sup> *Riley* was a rare unanimous decision in which the Court—in an opinion authored by the Chief Justice—seemed to mirror society’s distaste for the intrusive police practice.<sup>16</sup> The *Riley* Court framed its analysis of warrantless cell phone searches on three cases that *Riley* characterized as the search-incident doctrine’s “trilogy”<sup>17</sup>: *Chimel v. California*,<sup>18</sup> *United States v. Robinson*,<sup>19</sup> and *Arizona v. Gant*.<sup>20</sup> In reaching its common sense warrant requirement for cell phone searches, *Riley* might seem to have simply reaffirmed the alternative holdings in *Gant*—the third of *Riley*’s trilogy cases—both *Gant*’s holding that strictly limited law enforcement’s authority to conduct warrantless vehicle searches incident to arrest and the holding that approved an evidence-gathering search of an arrestee’s vehicle incident to arrest.<sup>21</sup> This Article argues that *Riley* did much more, however, limiting *Gant* in ways that conflict with the search-incident doctrine’s historical basis. Although *Riley*’s categorical protection of cell phone data has been applauded,<sup>22</sup> the *Riley* Court’s view of the search-incident doctrine will produce critically important consequences outside the cell phone context and, additionally, suggests a reorganization of the search-incident doctrine more generally.

Importantly, *Riley*’s limitation of *Gant* was *unnecessary* to the Court’s quite sensible conclusion that police must obtain a warrant

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15. *Id.* at 2491 (noting the Court’s “general preference to provide clear guidance to law enforcement through categorical rules”).

16. *See id.* at 2494–95 (“Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))).

17. *Id.* at 2484.

18. 395 U.S. 752 (1969).

19. 414 U.S. 218 (1973).

20. 556 U.S. 332 (2009).

21. *See Riley*, 134 S. Ct. at 2484 (citing *Gant*, 556 U.S. at 343).

22. *See, e.g.*, Editorial, *The Court Saves Cellphone Privacy*, N.Y. TIMES, June 26, 2014, at A26, available at <http://www.nytimes.com/2014/06/26/opinion/the-supreme-court-saves-cellphone-privacy.html>, archived at <http://perma.cc/6R YA-PE6F> (“Still, [the *Riley* Court’s] ruling reaffirmed the essence of the Fourth Amendment’s ban on unreasonable searches and seizures . . . even though the Bill of Rights was written by men who could not have imagined an iPhone in their maddest dreams.”); Opinion, *Smart Phones and the Fourth Amendment*, WALL ST. J. (June 26, 2014), <http://online.wsj.com/articles/smart-phones-and-the-fourth-amendment-1403738424#livefyre-comment>, archived at <http://perma.cc/J9BJ-KJ2N> (describing the *Riley* Court’s “wise[]” decision to require a warrant to search arrestee’s cellular phone as recognizing the “truth” and observing that “[l]iberals often claim the Constitution must change to accommodate a new era, though the genius of the document is that its core protections are abiding and universal”).

to search an arrestee's cellular phone.<sup>23</sup> *Riley*'s warrant requirement for cell phone searches was fully supported by *Riley*'s treatment of cellular phones as a special "category of effects"<sup>24</sup>—a search that was different from traditional incident searches because, from a practical perspective, a cell phone search could not be limited to law enforcement's perusal of cell phone data related to the arrest scene or even to the crime of arrest itself.<sup>25</sup> Instead, *Riley*'s gratuitous limitation of *Gant*—concluding that evidence-gathering incident searches were permissible only for arrestees' vehicles<sup>26</sup>—likely portends a modern reorganization of the search-incident doctrine. Without evidence gathering as an implicit justification in a properly limited search incident to arrest, *Riley*'s limitation of *Gant* calls into doubt law enforcement's authority to perform an incident search of an arrestee's *reaching distance*—a *Chimel* search—to look for evidence of the arrestee's crime once the arrestee has been handcuffed and is adequately secured.

Rather than relying solely on *Chimel*'s two "concerns,"<sup>27</sup> this Article argues that the search-incident doctrine has been supported—both before and after *Chimel*—by *three* justifications: officer safety, preservation of evidence, and importantly, the need to discover evidence of the crime of arrest. And, according to Justice Alito—who concurred in *Riley* to make the evidence-gathering argument—nothing in the past 100 years, including *Chimel* and its progeny cases, has eliminated the evidence-

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23. Cf. *Riley*, 134 S. Ct. at 2485; see *supra* note 14 and accompanying text.

24. See *Riley*, 134 S. Ct. at 2484–85; see *infra* notes 52–54 and accompanying text.

25. See generally *Riley*, 134 S. Ct. at 2485 (determining legitimacy of warrantless cell phone searches by asking "whether application of the search incident to arrest doctrine to this particular category of effects would untether the rule from the justifications underlying the *Chimel* exception" (internal quotation marks omitted)). The *Riley* Court additionally found it important that technology presently exists that allows law enforcement to easily prevent the loss of cell phone data while awaiting a warrant to search an arrestee's phone. See *id.* at 2487; see *infra* note 48 and accompanying text.

26. See *Riley*, 134 S. Ct. at 2492 (rejecting government's argument that "the *Gant* standard be imported from the vehicle context" because "*Gant* relied on circumstances unique to the vehicle context to endorse a search *solely* for the purpose of gathering evidence" (emphasis added) (internal quotation marks omitted)). Chief Justice Roberts's desire to limit *Gant* should come as a surprise to no one. Chief Justice Roberts, who wrote the Court's opinion in *Riley*, also joined Justice Alito's cogent dissent in *Gant*. See *Arizona v. Gant*, 556 U.S. 332, 364 (2009) (Alito, J., dissenting) (arguing that the majority's approach in *Gant* "leaves the law relating to searches incident to arrest in a confused and unstable state"); see *infra* notes 182–185 and accompanying text.

27. See *Riley*, 134 S. Ct. at 2485 ("We first consider each *Chimel* concern in turn.").



gathering rationale as justifying a properly limited incident search.<sup>28</sup> If *Chimel*, *Robinson*, and *Gant* are the search-incident doctrine's "trilogy,"<sup>29</sup> then Justice Alito's *Riley* concurrence makes clear that he was unwilling to ignore the doctrine's prequel—search-incident cases that upheld as reasonable law enforcement's authority to search for evidence of the crime of arrest within the areas permitted in a properly limited search incident to arrest.<sup>30</sup>

In Part I, this Article considers the *Riley* decision's analytical framework, including the narrow universe of search-incident cases that *Riley* deemed applicable in determining the cell phone cases and, additionally, *Riley*'s refusal to consider evidence gathering as a legitimate justification to search in a properly limited incident search. Part II traces the evolution of incident searches, first as a warrantless evidence-gathering search that turned on the search's reasonableness, then through the search's reorientation to a warrant exception justified by arrest-related exigency in *Chimel* and the cases that generalized *Chimel*, and more recently *Gant*, where a hybrid evidence-gathering incident search of vehicles was recognized. Additionally, Part II posits that although *Chimel* and its progeny were intended to provide clear boundaries on incident searches—i.e., the arrestee's reaching distance—to use in training law enforcement officers in the field, these cases did not eliminate law enforcement's authority to perform an evidence-gathering search within the areas permitted in a properly limited search incident to arrest. Part III considers the consequences of *Riley*'s reconfiguration of *Gant*, including the potential doctrinal instability that *Riley*'s retcon search-incident rule will produce and *Riley*'s likely impact on law enforcement's authority to perform an incident search of an arrestee's reaching distance once arrest-related exigency no longer exists because the arrestee has been handcuffed and is adequately secured. Part IV concludes.

#### I. *RILEY V. CALIFORNIA*: THE SAVIOR OF CELL PHONE PRIVACY

*As the text makes clear, the ultimate touchstone of the Fourth Amendment is "reasonableness." Our cases have determined that where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant. . . . In the absence of a warrant, a search is*

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28. See *id.* at 2496 (Alito, J., concurring); see *infra* notes 69–71 and accompanying text.

29. See *Riley*, 134 S. Ct. at 2484 (majority opinion).

30. See *id.* at 2495–96 (Alito, J., concurring); see *infra* notes 69–71.

*reasonable only if it falls within a specific exception to the warrant requirement.*<sup>31</sup>

Center stage in *Riley*'s consideration of warrantless cell phone searches is the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement.<sup>32</sup> Although the search-incident doctrine has existed for centuries, *Riley* decided the cell phone search cases based on three search-incident cases that date back only to 1969<sup>33</sup>: *Chimel v. California*,<sup>34</sup> *United States v. Robinson*,<sup>35</sup> and *Arizona v. Gant*.<sup>36</sup> In *Chimel*, the Court articulated generalized rules to establish the scope of incident searches, justifying this warrant exception on the exigency arising from arrest itself: (1) safety—the need to disarm the arrestee and remove weapons from the arrestee's immediate control, and (2) preservation of evidence—preventing the concealment or destruction of evidence.<sup>37</sup> *Chimel* represented an important reorientation of the search-incident doctrine—a doctrine that, prior to *Chimel*, had been based on the need to gather evidence from the arrestee and the area of the arrestee's possession for use at trial.<sup>38</sup> But the pre-*Chimel* search-incident doctrine had proven almost impossible to apply because of differing views regarding how broadly law enforcement could search the arrestee's environment in an evidence-gathering search incident to arrest.<sup>39</sup> *Chimel* therefore limited a search incident to arrest to the person of the arrestee and the area “within his immediate control”<sup>40</sup>—the arrestee's reaching distance—based on the exigency arising from arrest, and in doing so, placed critically important outer boundaries on the scope of incident searches.

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31. *Riley*, 134 S. Ct. at 2482 (majority opinion) (first ellipsis in original) (citations omitted) (internal quotation marks and brackets omitted).

32. *See id.* (“The two [cell phone] cases before us concern the reasonableness of a warrantless search incident to a lawful arrest.”). The Fourth Amendment guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .” U.S. CONST. amend. IV.

33. *Riley*, 134 S. Ct. at 2484. *See supra* note 17 and accompanying text.

34. 395 U.S. 752 (1969).

35. 414 U.S. 218 (1973).

36. 556 U.S. 332 (2009).

37. *See Chimel*, 395 U.S. at 763.

38. *See infra* notes 87–89 and accompanying text.

39. *See, e.g., Chimel*, 395 U.S. at 755 (observing that “[t]he decisions of this Court bearing upon [the search-incident-to-arrest exception] have been far from consistent, as even the most cursory review makes evident”); *see infra* notes 87–99 and accompanying text.

40. *Chimel*, 395 U.S. at 763. *See infra* text accompanying note 119.

In applying *Chimel*, the *Riley* Court was quick to dismiss that the first of *Chimel*'s concerns—officer safety—could be furthered by warrantless cell phone searches.<sup>41</sup> As *Riley* explained, once an arrestee's phone has been seized and secured, "data on the phone can endanger no one."<sup>42</sup> *Chimel*'s second concern—preventing the destruction of evidence—required a broader discussion involving cell phone technology: remote wiping of cell phone data and data encryption.<sup>43</sup> Remote wiping occurs when a phone receives a signal from another location, perhaps sent by a third party, that erases the cellular phone's stored data.<sup>44</sup> Data encryption, on the other hand, is a security feature that protects a cell phone's stored data from anyone who does not know the phone's password.<sup>45</sup> *Riley* dismissed the government's remote wiping and data encryption arguments with a two-pronged analysis: diminish and distinguish.

First, *Riley* diminished the factual basis for the government's preservation-of-evidence argument, stating that the Court had "been given little reason to believe that either problem [of remote wiping of cell phone data and data encryption was] prevalent."<sup>46</sup> Second, *Riley* distinguished *Chimel*—which the *Riley* Court explained had focused exclusively on the actions of the arrestee—not on concerns that a *third party* might attempt to destroy evidence.<sup>47</sup> And perhaps most importantly, *Riley* explained that if

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41. See *Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (majority opinion).

42. *Id.*

43. See *id.* at 2486.

44. See *id.* Prior to *Riley*, one of the primary legal issues that courts wrestled with in the cell phone cases concerned whether the information stored on an arrestee's cellular phone remained sufficiently "destructible," despite the phone's seizure, that the search-incident doctrine supported a warrantless search of the phone's electronic contents. Some courts concluded that data stored on an arrestee's cellular phone was "destructible," within the meaning of *Chimel*, because cell phone data could be lost through a "remote wipe"—a function that is available through most cell phone service providers or by purchasing a downloadable app—which removes data from the device after it is in a third party's hands. See, e.g., *Definition of: Remote Wipe*, PCMAG.COM, <http://www.pcmag.com/encyclopedia/term/66274/remote-wipe>, archived at <http://perma.cc/9N3Q-GL4V> (last visited Sept. 7, 2014) ("Using the Internet to establish the connections, the primary purpose of a remote wipe is to remove private data from a stolen smartphone, tablet or laptop computer. It may also delete apps and the OS [operating system], rendering the device useless."); see generally *United States v. Flores-Lopez*, 670 F.3d 803, 807–09 (7th Cir. 2012) (discussing remote wiping of cell phone data).

45. *Riley*, 134 S. Ct. at 2486.

46. *Id.*

47. *Id.* ("[T]hese broader concerns about the loss of evidence [from remote wiping of cell phone data and data encryption] are distinct from *Chimel*'s focus

police were concerned that a third party might attempt to remotely wipe an arrestee's cellular phone, law enforcement could take preventative steps short of searching the phone by placing it in a "Faraday bag"—an inexpensive, lightweight aluminum bag that isolates the phone from electronic signals that would otherwise delete the phone's stored data.<sup>48</sup>

*Riley* also distinguished *United States v. Robinson*, a search-incident decision that applied *Chimel*'s twin rationales to the "search of the contents of an item found on an arrestee's person."<sup>49</sup> *Robinson* upheld the arresting officer's authority to search a cigarette package—in which contraband was discovered—that the officer found in Robinson's coat pocket in a search incident to his arrest for driving with a revoked license.<sup>50</sup> As *Riley* explained, the *Robinson* Court concluded that the cigarette-pack search was reasonable—even though the arresting officer was not specifically concerned that Robinson might attempt to destroy evidence or that Robinson was armed—because *Chimel*'s two risks "are present in all custodial arrests" involving incident searches of "physical objects."<sup>51</sup>

But *Riley* declined to apply *Robinson* to incident searches of cellular phones despite acknowledging that a "mechanical application" of *Robinson* "might well support" warrantless cell phone searches.<sup>52</sup> *Riley* explained that *Robinson*'s bright-line conclusion that "physical objects" always present some danger to law enforcement and a risk that evidence might be destroyed was distinguishable from cellular phones—a "category of effects" that

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on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach.").

48. *See id.* at 2487 (observing that Faraday bags are "essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use").

49. *Id.* at 2488 (citing *United States v. Robinson*, 414 U.S. 218 (1973)).

50. *Robinson*, 414 U.S. at 220, 223.

51. *Riley*, 134 S. Ct. at 2483–85 (citing *Robinson*, 414 U.S. at 236) (explaining that *Robinson* "did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search"). *Riley* noted, however, that the Court "clarified" *Robinson*'s bright-line rule in a later case by limiting this search exception to "personal property . . . immediately associated with the person of the arrestee," which the Court in *United States v. Chadwick* concluded did not include a "200-pound, locked footlocker" that law enforcement had seized from the arrestees' control and stored at a different location. *See id.* (internal quotation marks omitted) (citing *United States v. Chadwick*, 433 U.S. 1, 15 (1977)).

52. *See id.* at 2484 (2014); *see supra* note 12.

do not implicate either of *Chimel*'s concerns.<sup>53</sup> Although *Riley* distinguished *Robinson*'s bright-line rule based on the "context of the physical objects," subsequent language revealed that *Riley* was more concerned with the phone's *contents*—which *Riley* described as encompassing "vast quantities of personal [digital] information."<sup>54</sup>

Finally, *Riley* also dispatched *Arizona v. Gant*,<sup>55</sup> the third of the Court's so-called "trilogy" cases.<sup>56</sup> As *Riley* explained, *Gant*'s two holdings limited the availability of a *Chimel*-based search of an arrestee's vehicle and, additionally, recognized "an independent exception" for the warrantless search of a vehicle's passenger compartment "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."<sup>57</sup> *Gant*'s evidence-gathering search, *Riley* explained, "stems not from *Chimel* . . . but from 'circumstances unique to the vehicle context'";<sup>58</sup> "unique circumstances" that *Riley* described as "a reduced expectation of privacy and heightened law enforcement needs when it comes to motor vehicles."<sup>59</sup> Because cell phone searches "bear neither of those characteristics," *Riley* distinguished *Gant*'s evidence-gathering search of an arrestee's vehicle from warrantless cell phone searches.<sup>60</sup> Finding that the search-incident trilogy—*Chimel*, *Robinson*, and *Gant*—did not control the question of warrantless cell phone searches, *Riley* held "that

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53. See *Riley*, 134 S. Ct. at 2484–85. *Riley* rejected the government's argument that cell phone data was searchable if police could have obtained the information from "a pre-digital counterpart" because both the volume of data stored on a phone and the "range of items" stored thereon made it unlikely that people could carry "such a variety of information in physical form." *Id.* at 2493.

54. See *id.* at 2485, 2490 ("Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different.").

55. 556 U.S. 332 (2009).

56. See *Riley*, 134 S. Ct. at 2484.

57. See *id.* (internal quotation marks omitted) (citing *Gant*, 556 U.S. at 343).

58. See *id.* (quoting *Gant*, 556 U.S. at 343).

59. *Id.* at 2492 (internal quotation marks omitted) (citing *Gant*, 556 U.S. at 343) ("Justice Scalia's *Thornton* opinion, on which *Gant* was based, explained that those unique circumstances are 'a reduced expectation of privacy' and 'heightened law enforcement needs' when it comes to motor vehicles." (quoting *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring))).

60. See *id.* *Riley* additionally distinguished *Gant*'s evidence-gathering search because it would have provided no practical limitation on warrantless cell phone searches. See *id.* ("It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone.").

officers must generally secure a warrant before conducting [a cell phone] search.<sup>61</sup>

Importantly, *Riley*'s discussion of *Gant* did more than simply distinguish between incident searches of vehicles and incident searches of cellular phones. *Riley* placed *Gant*'s two warrantless searches into separate warrant-exception categories, implicitly redefining *Gant*'s evidence-gathering search—from a search that was based on the search-incident doctrine's historical evidence-gathering justification<sup>62</sup> to, instead, an elaboration on the automobile exception.<sup>63</sup> Even accepting as true *Gant*'s unsurprising comment that its evidence-gathering search did not “follow” from *Chimel*, it is another thing altogether to maintain, as *Riley* did, that *Gant*'s search did not arise from the search-incident doctrine.<sup>64</sup> In so saying, *Riley* seemingly detached *Gant*'s evidence-gathering search from the search-incident doctrine and recast that search as a reasonable suspicion-based variant of the automobile exception.<sup>65</sup>

## II. THE SEARCH-INCIDENT-TO-ARREST DOCTRINE: AN ANCIENT RULE

*This right [to search for evidence of crime] has been uniformly maintained in many cases.*<sup>66</sup>

Is 100 years ancient? For the *Riley* Court, it apparently was.<sup>67</sup> Although Justice Alito concurred in the *Riley* judgment,<sup>68</sup> he wrote

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61. See *id.* at 2485; see *supra* note 14 and accompanying text.

62. Cf. *Riley*, 134 S. Ct. at 2492; see *supra* notes 57–60 and accompanying text. Although the *Gant* majority distinguished between *Gant*'s two holdings—explaining that *Gant*'s evidence-gathering search “d[id] not follow from *Chimel*”—*Gant* in no way suggested that its evidence-gathering holding was independent of, or had not arisen from, the search-incident doctrine. See *Arizona v. Gant*, 556 U.S. 332, 343 (2009). *Riley* went further than *Gant*, however, limiting the availability of *Gant*'s evidence-gathering search to the “unique circumstances” involved in the vehicle search context. Cf. *Riley*, 134 S. Ct. at 2492.

63. The automobile exception to the Fourth Amendment's warrant requirement authorizes law enforcement to perform a warrantless probable cause based search of a vehicle due to the vehicle's mobility and because the pervasive regulation of vehicles has reduced society's reasonable expectation of privacy in vehicles. See *California v. Carney*, 471 U.S. 386, 392 (1985).

64. Cf. *Riley*, 134 S. Ct. at 2484–86, 2492 (discussing and treating *Gant*'s evidence-gathering search as an “independent exception” from the Fourth Amendment's warrant requirement, suggesting thereby that the warrant exception for *Gant*'s evidence-gathering search was not derived from search-incident doctrine).

65. See *supra* notes 63–64 and accompanying text.

66. *Weeks v. United States*, 232 U.S. 383, 392 (1914).

separately to emphasize that it was a “mistake” for the Court to determine the legitimacy of warrantless cell phone searches based solely on *Chimel* and its progeny.<sup>69</sup> Justice Alito argued that the *Riley* Court erred in ignoring the “ancient rule” of the search-incident doctrine—a rule that “antedates the adoption of the Fourth Amendment by at least a century,”<sup>70</sup> and for which the Court previously concluded that the adoption of “the Fourth Amendment did not disturb this [ancient] rule.”<sup>71</sup>

Yet, the Court in *Riley* substantially trimmed the exception’s history—and, therefore, pedigree—writing that “the existence of the [search-incident-to-arrest] exception . . . has been recognized for a century, [and] its scope has been debated for nearly as long.”<sup>72</sup> In fact, not only is the search-incident doctrine much older than the *Riley* Court admitted, but *Riley* additionally failed to acknowledge the doctrine’s historical basis—the need to discover evidence for use at the arrestee’s trial.<sup>73</sup> Commentators have confirmed that the authority to search an arrestee has existed since

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67. Compare *Riley*, 134 S. Ct. at 2482 (majority opinion) and *infra* text accompanying note 72, with *Riley*, 134 S. Ct. at 2495 (Alito, J., concurring) and *infra* note 69–71 and accompanying text.

68. *Riley*, 134 S. Ct. at 2495 (Alito, J., concurring) (agreeing with the *Riley* Court’s conclusion that the Fourth Amendment did not support warrantless incident searches of arrestees’ cellular phones).

69. See *id.* at 2495–96 (arguing that pre-*Chimel* cases did not support the *Riley* Court’s view that search-incident doctrine “was based exclusively or primarily” on officer safety and preventing the destruction of evidence).

70. *Id.* (disagreeing with the *Riley* Court’s reliance on *Chimel* because “*Chimel*’s reasoning is questionable” and, additionally, disagreeing with *Riley*’s approach of ignoring pre-*Chimel* cases which had applied the “ancient” search-incident rule). Further, Justice Alito observed that relying solely on *Chimel*’s justifications was not logically consistent with how the Court had applied the search-incident doctrine in other contexts:

What ultimately convinces me that the rule is not closely linked to the need for officer safety and evidence preservation is that these rationales fail to explain the rule’s well-recognized scope. It has long been accepted that written items found on the person of an arrestee may be examined and used at trial. But once these items are taken away from an arrestee (something that obviously must be done before the items are read), there is no risk that the arrestee will destroy them. Nor is there any risk that leaving these items unread will endanger the arresting officers.

*Id.* at 2496.

71. See *id.* at 2495 (citing *Weeks*, 232 U.S. at 392).

72. *Id.* at 2482 (majority opinion).

73. Cf. *id.* at 2483–85 (limiting analysis of cell phone question to *Chimel* and *Chimel*-based search-incident cases).

at least the seventeenth century.<sup>74</sup> Importantly, searches incident to arrest were routinely justified by the need to obtain evidence for use at trial and were rarely the subject of constitutional challenge.<sup>75</sup>

In discussing the search-incident doctrine's evidence-gathering justification, Judge Cardozo observed that a "dearth of illustrative precedent both in our own country and abroad" supported searches of legally arrested persons to look for evidence of crime.<sup>76</sup> Treatises written in the nineteenth century likewise assumed that evidence gathering was a legitimate reason to search incident to arrest—to discover evidence for use at the arrestee's trial.<sup>77</sup> Indeed, a lawful arrest authorized the arresting officer to search and seize property that could afford:

[E]vidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape. The officer has the undoubted right to make the search, and, considering the nature of the accusation, he may, when acting in good faith, take into his possession any articles he may suppose will aid in securing the conviction of the prisoner, or will prevent escape.<sup>78</sup>

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74. Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 764 (1994) (citing TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 28–29 (1969)) (describing Professor Telford Taylor's "brilliant study of the Fourth Amendment" as reminding that "since at least the seventeenth century, the common law has recognized broad authority to search an arrestee and his immediate surroundings without a search warrant, and even when the arrest itself was warrantless").

75. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 401 (1995) ("Searches for bloody shirts, murder weapons, and stolen goods, as long as they were incident to arrest, remained legal, indeed unchallenged.").

76. *People v. Chiagles*, 142 N.E. 583, 583–84 (N.Y. 1923) ("The books speak broadly of searching the person of the prisoner for anything that may be of use as evidence upon the trial . . . or for anything that will aid in securing the conviction . . . ." (citations and internal quotation marks omitted)).

77. See e.g., F. WHARTON, *CRIMINAL PLEADING AND PRACTICE* § 60, at 45 (8th ed. 1880); J. BISHOP, *CRIMINAL PROCEDURE* §§ 210–12, at 127 (2d ed. 1872). As Professor Bishop explained, the arresting officer was authorized to search:

[T]he prisoner's person, or [for items] otherwise in his possession, [to look for] either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, [and the arresting officer] may take the same, and hold them to be disposed of as the court may direct.

BISHOP, *supra*.

78. *Holker v. Hennessey*, 42 S.W. 1090, 1093 (Mo. 1897). As the Montana Supreme Court explained, the "power" to conduct an evidence-gathering search



The long-standing acceptance of the search-incident doctrine, and the evidence-gathering assumptions that underlie it, were the likely reason that the Court was not called upon until 1914 in *Weeks v. United States* to consider the legitimacy of a search incident to arrest.<sup>79</sup> And, as Justice Alito observed in his *Riley* concurrence, since the *Weeks* decision the Court has never eliminated evidence gathering as a legitimate basis to perform a properly limited search incident to a lawful arrest.<sup>80</sup>

*A. Evidence-Gathering Searches Incident to Arrest: The Search-Incident Doctrine's Original Rationale*

The Court's first approval of a search incident to arrest appears in dictum in *Weeks v. United States*, where the Court explained that the Fourth Amendment's protection against unreasonable searches and seizures was not implicated when police "search[ed] the person of the accused [when he or she had been] legally arrested, to discover and seize the fruits or evidences of crime," because that search had "always [been] recognized under English and American law."<sup>81</sup> *Weeks*'s reference to the search of an arrestee's person was thereafter expanded, first, to include the area "in [the arrestee's] control,"<sup>82</sup> and then later, to a search of "the place where the arrest is made."<sup>83</sup> The Court's discussions evolved from dictum into law in 1927 in *Marron v. United States*,<sup>84</sup> which

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at the time of a lawful arrest existed by virtue of the arresting officer's "public duty," which necessitated an immediate search following arrest because otherwise "all evidences of crime and of identification of the criminal might be destroyed before the prisoner could be taken before the magistrate." *Id.*

79. See *Weeks v. United States*, 232 U.S. 383, 392 (1914); see *supra* text accompanying note 66.

80. Cf. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (Alito, J., concurring) ("And neither in *Weeks* nor in any of the authorities discussing the old common-law rule have I found any suggestion that [the search-incident doctrine] was based exclusively or primarily on the need to protect arresting officers or to prevent the destruction of evidence.").

81. *Weeks*, 232 U.S. at 391–92.

82. *Carroll v. United States*, 267 U.S. 132, 158 (1925).

83. *Agnello v. United States*, 269 U.S. 20, 30 (1925).

84. 275 U.S. 192 (1927). In *Marron*, federal agents secured a search warrant to look for intoxicating liquors at a certain location, and while executing the search warrant, the agents arrested an individual whom they encountered on the premises for operating an illegal drinking establishment. *Id.* at 193–94. Based upon the authority of that arrest, the agents seized items not listed in the search warrant—including an incriminating ledger the agents found in a closet—in a search that *Marron* upheld because the ledger was "part of . . . [the] equipment actually used to commit the offense." *Id.* at 194, 199.

upheld as reasonable a premises search incident to the arrest of a person whom federal agents caught committing a crime when they arrived to execute a search warrant.<sup>85</sup>

From 1927 until *Chimel* was decided in 1969, the Court struggled to reconcile competing lines of authority—with one line turning on the proper *scope* of a search incident to arrest, and the other on the *triggering circumstances* that would make the search available to law enforcement in the first place.<sup>86</sup> Prior to *Chimel*, incident searches were assumed to be evidence-gathering searches—searches directed at uncovering evidence of the crime of arrest.<sup>87</sup> The right to conduct an evidence-gathering search arose from the authority of a lawful arrest, leaving the Court to consider whether the incident search at issue was “reasonable”—a question that generally turned on the scope of the evidence-gathering search.<sup>88</sup> To determine reasonableness, the Court considered each search’s “own facts and circumstances.”<sup>89</sup> Under this potentially open-ended rationale, incident searches of entire homes or offices were upheld if the Court was satisfied that arresting officers were searching for evidence of the crime of arrest, not just rummaging through the arrestee’s things to see “whatever might be turned up.”<sup>90</sup> If the Court concluded that officers were legitimately looking for evidence of the crime of arrest, expansive and extremely thorough premises searches incident to an occupant’s arrest were often permitted,<sup>91</sup> based on the Court’s broad

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85. *Id.* at 199 (upholding incident search of premises because “[the agents] had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise”).

86. *See infra* notes 90–102 and accompanying text.

87. *See, e.g., Marron*, 275 U.S. at 198–99; *Ker v. California*, 374 U.S. 23, 41–42 (1963) (plurality opinion); *Abel v. United States*, 362 U.S. 217, 235–41 (1960); *Draper v. United States*, 358 U.S. 307, 314 (1959); *United States v. Rabinowitz*, 339 U.S. 56, 61–66 (1950), *overruled by Chimel*, 395 U.S. 752; *Harris v. United States*, 331 U.S. 145, 151, 155 (1947), *overruled by Chimel*, 395 U.S. 752.

88. *See, e.g., Marron*, 275 U.S. at 198–99.

89. *See, e.g., Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (“There is no formula for the determination of reasonableness.”).

90. *Rabinowitz*, 339 U.S. at 61–62 (upholding incident search of arrestee’s one-room business office, including desk, safe, and file cabinets, over a period of one and one-half hours; search “was not general or exploratory” because officers were searching for evidence of crime of arrest—stamps with forged overprints).

91. *Harris*, 331 U.S. at 153 (upholding incident search of arrestee’s four-room apartment over five-hour period to look for forged checks for which defendant had been arrested; “[t]he search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed”).

interpretation of the areas within an arrestee's "control" or "possession" that might conceal evidence of the crime of arrest.<sup>92</sup>

The volatility of search-incident doctrine arose, however, because even "specific[]" searches—those in which law enforcement was looking for evidence of the crime of arrest—were sometimes struck down if the Court believed that it would have been "practicable" for the investigating officers to obtain a search warrant prior to their arrest of the premises' occupant.<sup>94</sup> In the practicability cases, the Court refused to limit its analysis to determining whether the incident search was reasonable in scope. Instead, the Court focused on whether proper *triggering circumstances* for the warrantless search were present—an analysis that turned on whether law enforcement could have obtained a search warrant, but failed to do so.<sup>95</sup> Although the practicability approach advanced the goal of imposing a categorical warrant requirement,<sup>96</sup> it did so only

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92. Cf. *Chimel*, 395 U.S. at 760 (recounting expansive premises searches upheld under *Rabinowitz*).

93. See *Rabinowitz*, 339 U.S. at 62 ("Specificity was the mark of the search and seizure here."), *overruled by Chimel*, 395 U.S. 752; see *supra* note 90.

94. See, e.g., *Trupiano v. United States*, 334 U.S. 699, 705–10 (1948) ("[N]o reason whatever has been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant . . ."), *overruled by Rabinowitz*, 339 U.S. 56, 65 (rejecting argument that search-warrant requirement should be "crystallized into a *sine qua non* to the reasonableness of a search"), *overruled by Chimel*, 395 U.S. 752.

95. See, e.g., *Kremen v. United States*, 353 U.S. 346, 347 (1957) (*per curiam*) (rejecting warrantless incident search of entire cabin and seizure of cabin's contents because agents had cabin under surveillance for twenty-four hours).

96. Cf. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("[O]ur jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone. . . . By the late 1960's, the preference for a warrant had won out, at least rhetorically." (citations omitted)). Based upon a textual analysis of the Fourth Amendment, Professor Lloyd Weinreb described the warrant-requirement debate as follows:

A thoughtful and strict grammarian might conclude from the structure of the amendment that the second clause is a partial explication of the first, so that any search conducted without a warrant is, by that fact alone, unreasonable. . . . Another grammarian might conclude that the first clause stated a condition for application of the second, so that there was a requirement that a search not be "unreasonable" independent of the particular requirements of the warrant clause.

Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 47–48 (1974). By the late 1960's, the Court had settled on the warrant preference approach. See *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—

marginally—in those cases where it was clear that police had been watching the suspect for some (undesignated, but nevertheless unreasonable) period of time. The practicability approach never fully won out, however, and additionally, injected new uncertainties into the Court’s search-incident-to-arrest determinations—by requiring consideration of whether exigent circumstances existed—such as whether the arrestee was apprehended while committing a felony in the officer’s presence,<sup>97</sup> or whether the situation otherwise called for quick action on the part of law enforcement.<sup>98</sup>

Deciding which of these competing lines of cases would control in any given fact situation forced the Court to rely on hair-splitting distinctions between the facts involved in the two lines.<sup>99</sup> The Court’s repeated vacillations—likely symptomatic of its conflicted view of the categorical warrant requirement itself<sup>100</sup>—contributed to the schizophrenia of the Court’s search-incident caselaw<sup>101</sup> and produced the jurisprudential pendulum swings for which the search-incident-to-arrest exception is so well known.<sup>102</sup>

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subject only to a few specifically established and well-delineated exceptions.” (citations omitted)).

97. *United States v. Lefkowitz*, 285 U.S. 452, 462–63 (1932), *abrogated by* *Harris v. United States*, 331 U.S. 145 (1947).

98. *Ker v. California*, 374 U.S. 23, 42 (1963) (plurality opinion) (upholding premises search because defendant’s “furtive conduct” established that “time clearly was of the essence” in preventing loss of contraband).

99. *See, e.g., Lefkowitz*, 285 U.S. at 464–65 (distinguishing similar incident search to the one upheld in *Marron* because *Marron* involved seizure of materials used “to carry on the criminal enterprise,” but the incident search in *Lefkowitz* was an “exploratory and general” search “made solely to find evidence of respondents’ guilt”); *Harris*, 331 U.S. at 153 (distinguishing *Go-Bart Importing Co.* and *Lefkowitz* because officers in *Harris* were specifically looking for canceled checks that were evidence of crimes charged), *overruled by* *Chimel*, 395 U.S. 752; *Ker*, 374 U.S. at 42 (distinguishing *Trupiano* because agents in *Trupiano* had been in possession of information sufficient to obtain search warrant for three weeks, while officers in *Ker* “had reason to act quickly” to prevent the likely loss of marijuana); *see supra* notes 87–99 and accompanying text.

100. *See supra* note 96.

101. *Cf. United States v. Rabinowitz*, 339 U.S. 56, 67 (1950) (Black, J., dissenting) (“In recent years, the scope of the [search-incident-to-arrest] rule has been a subject of almost constant judicial controversy both in trial and appellate courts. In no other field has the law’s uncertainty been more clearly manifested.”), *overruled by* *Chimel*, 395 U.S. 752.

102. *See Arizona v. Gant*, 556 U.S. 332, 350 (2009) (recounting the “checkered history of the search-incident-to-arrest exception”).

*B. The Pendulum Swings in Chimel v. California*

It is argued in the present case that it is “reasonable” to search a man’s house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on consideration relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point.<sup>103</sup>

After its decision in *United States v. Rabinowitz*,<sup>104</sup> the Court’s preference for search warrants<sup>105</sup>—rather than determining the search’s “reasonableness” on a case-by-case basis—had become manifest, leading to the sea change that was *Chimel*.<sup>106</sup> In *Chimel*, police went to Chimel’s home with a warrant for Chimel’s arrest for a coin-shop burglary.<sup>107</sup> No search warrant for Chimel’s home had been obtained, however.<sup>108</sup> Chimel’s wife allowed the officers to wait inside the house until Chimel returned from work.<sup>109</sup> When Chimel entered the home, one of the officers handed him the arrest warrant and asked for permission to “look around.”<sup>110</sup> Chimel refused but was told that, “on the basis of the lawful arrest,” officers were permitted to conduct such a search.<sup>111</sup> What ensued was a search of the entire three-bedroom house—including the attic, garage, and a small workshop—that took between forty-five minutes and an hour.<sup>112</sup> During that search, items were seized that

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103. *Chimel v. California*, 395 U.S. 752, 764–65 (1969).

104. 339 U.S. 56 (1950), *overruled by Chimel*, 395 U.S. 752. *See supra* notes 90, 93; *cf.* Weinreb, *supra* note 96, at 73 (“In the wake of *Rabinowitz*, some lower courts all but ignored the warrant clause whenever the police had made a related arrest.”).

105. *See supra* notes 96 and accompanying text.

106. *Compare Rabinowitz*, 339 U.S. at 65–66 (“The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.”), *with Chimel*, 395 U.S. at 763 (“[Searches of areas beyond those justified by arrest-related exigency], in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The ‘adherence to judicial processes’ mandated by the Fourth Amendment requires no less.”).

107. *Chimel*, 395 U.S. at 755. *Chimel* accepted the California Supreme Court’s conclusion that Chimel’s arrest was valid “[w]ithout deciding the question.” *Id.*

108. *Id.* at 754.

109. *Id.* at 753.

110. *Id.*

111. *Id.* at 753–54.

112. *Id.* at 754.

were introduced over Chimel's objection at his trial on the burglary charges.<sup>113</sup> The Supreme Court granted certiorari to consider the constitutionality of the incident search of Chimel's home, observing that the Court's cases on this issue "have been far from consistent, as even the most cursory review makes evident."<sup>114</sup>

If the *Chimel* Court had been limited to its two prior lines of authority, yet another hair-splitting decision would have resulted—the incident search in *Chimel* could have been analyzed under either of the Court's two lines. Based on the *Rabinowitz* line, the officers' search of Chimel's entire house incident to his arrest was arguably reasonable.<sup>115</sup> The officers were looking for coins and other small items that were stolen in the burglary of a coin shop, items that could easily have been hidden anywhere inside Chimel's home. On the other hand, the officers' failure to obtain a search warrant for Chimel's home despite the fact that they apparently could have done so was potentially fatal under the practicability line.<sup>116</sup> Rather than continue down either of those competing paths, the *Chimel* Court reoriented the search-incident doctrine away from reasonableness determinations—under which a search warrant was not constitutionally required<sup>117</sup>—to, instead, a warrant exception that was justified by the exigency arising from arrest itself: protection of officer safety and the need to preserve evidence.<sup>118</sup>

In establishing the *scope* of an incident search based on arrest-related exigency, *Chimel* explained:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And *the area into which an arrestee might reach in order to grab a weapon or evidentiary items* must, of course, be governed by a like rule. A gun on a table or in a drawer in front of

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113. *Id.*

114. *Id.* at 755.

115. *Id.* at 766 (explaining that the Court could "draw a line" between the premises searches in *Rabinowitz* and *Harris* and the premises search in *Chimel*, although "such a distinction would be highly artificial").

116. *Cf. id.* at 775 (White, J., dissenting) ("[T]here was surely probable cause on which a warrant could have issued to search the house for the stolen coins.").

117. *See supra* notes 87–92 and accompanying text.

118. *See Chimel*, 395 U.S. at 763 (majority opinion).

one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.<sup>119</sup>

By relying on officer safety and preservation-of-evidence concerns, *Chimel* both framed its analysis in terms of a warrant exception and laid to rest the long-contested scope issue for premises searches incident to arrest. *Chimel* overruled *United States v. Rabinowitz*<sup>120</sup> and *Harris v. United States*,<sup>121</sup> and in doing so, rejected those cases' expansive view of the area within an arrestee's control, which courts had come to view as the arrestee's entire home.<sup>122</sup> Importantly, however, *Chimel* never overruled those cases' evidence-gathering rationale, just the expansive premises searches that the seemingly unconfined evidence-gathering basis had produced.<sup>123</sup> *Chimel* was therefore directed at finding an endpoint for premises searches incident to arrest, as opposed to categorically rejecting *Rabinowitz* and *Harris*'s evidence-gathering rationale if the premises search was properly limited to the areas supported by arrest-related exigency.<sup>124</sup>

In fact, even *Chimel* itself recognized law enforcement's general interest in evidence gathering during searches incident to arrest—albeit limited to the areas justified by *Chimel*'s exigency rationale—language that is inconsistent with construing *Chimel* to

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119. *Id.* at 762–63 (emphasis added) (internal quotation marks omitted).

120. 339 U.S. 56 (1950), overruled by *Chimel*, 395 U.S. 752. See *supra* note 90.

121. 331 U.S. 145 (1947), overruled by *Chimel*, 395 U.S. 752. See *supra* note 91.

122. *Chimel*, 395 U.S. at 768 ("It is time . . . to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, [*Rabinowitz* and *Harris*] are no longer to be followed.").

123. Cf. *id.* at 766 ("No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items."); *United States v. Robinson*, 414 U.S. 218, 225–26 (1973) (explaining that *Chimel* "overruled *Rabinowitz* and *Harris* as to the area of permissible search incident to a lawful arrest" (emphasis added)).

124. *Chimel*'s focus on scope—rather than on *Rabinowitz*'s evidence-gathering rationale—is reflected in *Chimel*'s observation that *Rabinowitz*'s expansive view of the area within an arrestee's control was a doctrine that "at least in the broad sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis." See *Chimel*, 395 U.S. at 760 (emphasis added).

require the potential destruction of evidence as a *precondition* for a *Chimel* search. Although *Chimel* referenced “destructible evidence” in describing the scope of a properly limited premises search,<sup>125</sup> *Chimel*’s holding also supported evidence gathering of the crime of arrest as an additional search-incident motivation. As the *Chimel* Court explained: “The search [in *Chimel*] went far beyond the petitioner’s person and the area from within which he might have obtained either a weapon or *something that could have been used as evidence against him*.”<sup>126</sup> *Chimel*’s use of language such as “gain[ing] possession”<sup>127</sup> and “obtain[ing]” a weapon or evidentiary items<sup>128</sup> is in no way inconsistent with an evidence-gathering basis to search incident to arrest. *Chimel* used those descriptions to establish its reaching-distance limitation<sup>129</sup>—an entirely separate question from what it is that an arrestee might lunge to “obtain.”<sup>130</sup> Especially telling, in the early years after *Chimel* the Court harmonized *Chimel* with the search-

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125. See *id.* at 763; see *supra* text accompanying note 119.

126. *Chimel*, 395 U.S. at 768 (emphasis added).

127. *Id.* at 763.

128. *Id.* at 768. See *supra* text accompanying notes 119, 126.

129. See *Chimel*, 395 U.S. at 763 (1969) (including within scope of valid incident search “the area into which an arrestee *might reach*” (emphasis added)); see *supra* text accompanying note 119; *Thornton v. United States*, 541 U.S. 615, 635 (2004) (Stevens, J., dissenting) (characterizing *Chimel* as articulating “reaching-distance principle” in establishing scope of valid incident search); see also *New York v. Belton*, 453 U.S. 454, 461 (1981) (describing *Chimel* as authorizing incident search of items “within an arrestee’s reach”), *abrogated by* *Davis v. United States*, 131 S. Ct. 2419 (2011); cf. *Thornton*, 541 U.S. at 623 n.3 (majority opinion) (explaining that *Belton* adopted “bright-line rule” concerning scope of vehicle search because determining whether item in vehicle’s passenger compartment was “within an arrestee’s reaching distance under *Chimel*” was “unworkable”).

130. Cf. *Chimel*, 395 U.S. at 768. The view that *Chimel* was based solely upon arrest-related exigency—the need to search for weapons and to prevent the loss of destructible evidence—was likely bolstered by the Court’s opinions that used this portion of *Chimel*’s rationale as a basis to distinguish *Chimel* from other warrantless searches. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 29 (1968) (differentiating more-limited search permitted in frisk from search incident to arrest because frisk was “not justified by any need to prevent the disappearance or destruction of evidence of crime”); *Illinois v. Lafayette*, 462 U.S. 640, 649 (1983) (Marshall, J., concurring) (distinguishing inventory search from search incident to arrest, explaining that “[a] warrantless search incident to arrest must be justified by a need to remove weapons or prevent the destruction of evidence”). However, these cases’ comparisons to *Chimel* suggest no disapproval of *Chimel*’s treatment of evidence gathering as an *additional* motivation to perform a search incident to arrest (within *Chimel* limits). See *supra* notes 119–129 and accompanying text. And, importantly, these opinions are in no way inconsistent with the post-*Chimel* cases in which incident searches were supported, in part, by the need to gather evidence of the crime of arrest. See *infra* note 131 and accompanying text.



incident doctrine's evidence-gathering basis. As the Court's early post-*Chimel* cases reflect, evidence gathering of the crime of arrest remained a legitimate law enforcement rationale to search incident to arrest—so long as the scope of that search was limited to the areas designated in *Chimel*.<sup>131</sup>

*Chimel* was silent, however, on the issue of whether the now-limited search was available even when the search's justifications were not present. Therefore, after *Chimel*, even if arresting officers avoided searches that pushed *Chimel*'s exigency-based outer boundary (the arrestee's reaching distance), the question remained whether authority to search incident to arrest would be generalized to all arrests, even those in which the arrestee was handcuffed and the scene was under the control of law enforcement. The Court granted certiorari to answer this question, at least as it pertained to the search of an arrestee's person incident to arrest, just four years later in *United States v. Robinson*.<sup>132</sup>

In *Robinson*, the defendant was lawfully arrested and taken into custody for driving with a revoked license.<sup>133</sup> During a pat-down search, the arresting officer felt an object in Robinson's coat pocket that the officer could not identify from its shape.<sup>134</sup> The officer retrieved the object from Robinson's pocket and found it to be a "crumpled up cigarette package,"<sup>135</sup> which the officer opened and found heroin capsules inside. The United States Court of Appeals for the District of Columbia reversed Robinson's eventual conviction for possession of heroin, finding that the arresting officer lacked probable cause to believe that the cigarette package

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131. See *Coolidge v. New Hampshire*, 403 U.S. 443, 482 (1971) (plurality opinion) ("We did not indicate [in *Chimel*] . . . that the police must obtain a warrant if they anticipate that they will find specific evidence during the course of [a search incident to arrest]."); *Id.* at 514 (White, J., concurring and dissenting) (arguing that while *Chimel* "narrowed the permissible scope of incident searches," *Chimel* did not require law enforcement to obtain a warrant to "discover evidence of crime" within a "properly limited" search incident to arrest); *Cupp v. Murphy*, 412 U.S. 291, 292, 296 (1973) (upholding, as valid under *Chimel*, the warrantless taking of fingernail scrapings from murder-suspect husband, even though husband was not arrested for wife's murder until a month later); *United States v. Edwards*, 415 U.S. 800, 802 (1974) (explaining that warrant exception for incident searches "has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime" (emphasis added)); see also *California v. Acevedo*, 500 U.S. 565, 575–76 (1991) ("Under *Belton*, the same probable cause to believe that a container holds drugs will allow the police to arrest the person transporting the container and search it.").

132. 414 U.S. 218 (1973).

133. *Id.* at 220–21.

134. *Id.* at 223.

135. *Id.* (quoting arresting officer).

contained a weapon or evidence of the crime of arrest—driving without a license.<sup>136</sup>

The Supreme Court ultimately reversed the D.C. Circuit’s ruling, and in doing so, articulated the first of its generalized interpretations of *Chimel*. In *Robinson*, the Court authorized a search of the arrestee’s person incident to arrest in all cases, and additionally, refused to require a case-by-case determination of whether a basis to search the arrestee was present under *Chimel*’s twin rationales.<sup>137</sup> As *Robinson* explained:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.<sup>138</sup>

With the authority to perform an incident search of the arrestee’s *person* generalized to all arrests in *Robinson*, most courts likewise assumed that police were authorized to perform a *Chimel* search of the arrestee’s *reaching distance* in every case even if the arrestee was handcuffed and adequately secured at the time of the search.<sup>139</sup> However, *Chimel* proved especially problematic when

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136. *Id.* at 227.

137. *Id.* at 235 (holding that an incident search of the arrestee’s person was both an exception to the Fourth Amendment’s warrant requirement and was “also a ‘reasonable’ search under that Amendment”).

138. *Id.* Prior to the Court’s recent decision in *Riley*, some courts interpreted *Robinson*’s generalized authority to search an arrestee’s person incident to arrest to, additionally, support the warrantless search of the arrestee’s cellular phone if—like the cigarette package at issue in *Robinson*—the phone was found on the arrestee’s person. *See, e.g.,* *People v. Riley*, No. D059840, 2013 WL 475242, at \*6 (Cal. Ct. App. Feb. 8, 2013) (citing *People v. Diaz*, 244 P.3d 501, 505 (Cal. 2011)) (upholding incident search of arrestee’s cellular phone because “[*People v.*] *Diaz* controls the present case, and the key question is whether *Riley*’s cell phone was ‘immediately associated’ with his ‘person’ when he was stopped”), *rev’d and remanded by* *Riley v. California*, 134 S. Ct. 2473 (2014); *see also Riley*, 134 S. Ct. at 2484; *see supra* note 10.

139. *See, e.g.,* *United States v. Turner*, 926 F.2d 883, 886–88 (9th Cir. 1991) (upholding incident search of bedroom in which arrestee was arrested, even though arrestee had been handcuffed and moved to a different room at time of search, because the bedroom that police searched had been within arrestee’s control when he was arrested and police acted reasonably in moving arrestee to a different room before searching); *United States v. Lyons*, 706 F.2d 321, 330 (D.C. Cir. 1983) (acknowledging that determination of arrestee’s reaching distance “ha[d] not been interpreted rigidly” because arrests involve “dangerous,” rapidly unfolding circumstances; police “cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee’s grasp”). *But see* *United States v. Myers*, 308 F.3d 251, 273 (3d

the arrestee's reaching distance included the passenger compartment of a vehicle.<sup>140</sup> State and federal appellate courts divided on whether to apply the fact-specific *Chimel* analysis to incident searches of vehicles, or instead, a generalized rule like the one articulated in *Robinson*. *Robinson*'s reliance on a bright-line search-incident rule<sup>141</sup> may have contributed to the Court's willingness to craft additional generalized rules to govern vehicle searches incident to arrest.<sup>142</sup>

The Court granted certiorari in *New York v. Belton* to resolve the then "widespread conflict" in the state and federal courts concerning whether police could search the passenger compartment of a vehicle incident to an arrest of the vehicle's occupant.<sup>143</sup> The arrestee in *Belton* was one of four men riding in a vehicle that was lawfully stopped for speeding.<sup>144</sup> The lone investigating officer soon determined that probable cause existed to arrest the vehicle's occupants for possession of marijuana.<sup>145</sup> The officer instructed the men to exit the vehicle, patted them down, separated them from one another, and then proceeded to search the passenger compartment of the vehicle.<sup>146</sup> The officer found cocaine in the zippered pocket of Belton's jacket, which was located on the back seat of the car.<sup>147</sup> The New York Court of Appeals invalidated the incident search of

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Cir. 2002) (invalidating incident search of bag located approximately three feet from arrestee because arrestee was handcuffed with his hands behind his back, face-down, guarded by two officers, and the bag was zipped closed).

140. See *Davis v. United States*, 131 S. Ct. 2419, 2424 (2011) ("This rule may be stated clearly enough, but in the early going after *Chimel* it proved difficult to apply, particularly in cases that involved searches inside of automobiles after the arrestees were no longer in them." (internal quotation marks and brackets omitted)).

141. See Wayne R. LaFare, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 ("A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts . . . may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field." (internal quotation marks omitted)).

142. Cf. *Thornton v. United States*, 541 U.S. 615, 620 (2004) (majority opinion) (citing *New York v. Belton*, 453 U.S. 454 (1981)) (explaining that the *Belton* Court had considered benefits of *Robinson*'s bright-line rule in arriving at generalized search-incident rules for vehicles).

143. Cf. *id.* at 633 (Stevens, J., dissenting) (recounting background giving rise to grant of certiorari in *Belton*).

144. *New York v. Belton*, 453 U.S. 454, 455 (1981).

145. The officer smelled "burnt marihuana" upon approaching the vehicle and observed an envelope marked "Supergold" on the vehicle's floorboard, which the officer associated with marijuana. *Id.* at 455–56.

146. *Id.* at 456.

147. *Id.*

the vehicle, however, because at the time of the search the vehicle's four occupants were under arrest and the vehicle and its contents were "safely within the exclusive custody and control of the police."<sup>148</sup> The United States Supreme Court granted certiorari because "courts ha[d] found no workable definition of the area within the immediate control of the arrestee when that area arguably includes the interior of an automobile."<sup>149</sup>

Rather than following *Chimel*'s fact-intensive determination of the area within the arrestee's reaching distance, *Belton* articulated a generalized rule concerning the scope of a vehicle search incident to arrest—the vehicle's entire passenger compartment.<sup>150</sup> *Belton* supported its generalization that the vehicle's entire passenger compartment was within an arrestee's reaching distance by highlighting the need for a "straightforward," "workable rule" that could be readily understood and administered by officers in the field.<sup>151</sup> *Belton* additionally established generalized rules concerning "containers" uncovered during an incident search.<sup>152</sup> As *Belton* explained:

[P]olice may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.<sup>153</sup>

*Belton* described a "container" as "any object capable of holding another object," which *Belton* then illustrated with a list of receptacles such as "luggage, boxes, bags, clothing, and the like."<sup>154</sup> Finally, *Belton* limited its broad, generalized authority to perform vehicle searches incident to arrest with an additional

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148. *People v. Belton*, 407 N.E.2d 420, 423 (N.Y. 1980), *rev'd*, *New York v. Belton*, 453 U.S. 454 (1981).

149. *Belton*, 453 U.S. at 460 (internal quotation marks omitted).

150. *Id.*

151. *Id.* at 459–60 ("In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization.").

152. *Id.* at 460.

153. *Id.* at 460–61 (citations omitted).

154. *Id.* at 460 n.4. *Belton* further explained that "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment" were "container[s]" for *Belton* purposes. *Id.*

generalized rule—an incident search of an arrestee’s vehicle does not include the vehicle’s trunk.<sup>155</sup>

*Belton*’s generalized rules were far less defensible than the common sense protections that *Robinson* provided to law enforcement, however.<sup>156</sup> After *Belton*, police treated incident searches of vehicles as an “entitlement,”<sup>157</sup> engaging in the practice even when there was no legitimate danger to officers or risk that evidence in the vehicle could be concealed or destroyed.<sup>158</sup> Lower courts’ expansive interpretations of the already-generalized *Belton* rules did not go unnoticed. In *Thornton v. United States*, two members of the Court went out of their way to criticize this police practice while addressing another *Belton* issue that had plagued the lower courts<sup>159</sup>—the question of whether a vehicle search incident to arrest should be expanded to include the vehicle of an arrestee who was simply within reaching distance of his or her vehicle, but was not actually inside it, at the time the officer initiated contact.<sup>160</sup> Relying on *Belton*, the Court in *Thornton* adopted a “recent occupant” trigger, meaning that *Thornton* extended *Belton*’s generalized rules to allow a *Belton* search of an arrestee’s vehicle if the arrestee was a recent occupant who was near the vehicle at the time of arrest—rather than relying on *Chimel*’s fact-specific determination of the arrestee’s reaching distance.<sup>161</sup>

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155. *Id.* (“Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.”).

156. *Cf.* *United States v. Robinson*, 414 U.S. 218, 235 (1973); *see supra* notes 137–38.

157. *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring).

158. *See, e.g.,* *United States v. Milton*, 52 F.3d 78, 80 (4th Cir. 1995); *United States v. Willis*, 37 F.3d 313, 316–18 (7th Cir. 1994); *United States v. White*, 871 F.2d 41, 43–44 (6th Cir. 1989); *United States v. McCrady*, 774 F.2d 868, 871–72 (8th Cir. 1985); *United States v. Cotton*, 751 F.2d 1146, 1148–50 (10th Cir. 1985).

159. *See Thornton*, 541 U.S. at 624 (O’Connor, concurring) (criticizing police practice of conducting *Belton* search of vehicle after arrestee had been secured, which Justice O’Connor viewed as “a direct consequence of *Belton*’s shaky foundation”). Justice Scalia argued that the police practice of handcuffing an arrestee and securing him or her in the back of a squad car meant that “[i]f it was ever true that the passenger compartment is in fact generally, even if not inevitably, within the arrestee’s immediate control at the time of the search, it certainly is not true today.” *See id.* at 628 (Scalia, J., dissenting) (citation and internal quotation marks omitted).

160. *See id.* at 617–19 (majority opinion).

161. *Id.* at 623–24 (“So long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.”).

*Thornton* managed to cobble together a five-vote majority in favor of expanding *Belton*'s generalized search-incident rule, even though it was clear that most Justices on the Court believed that *Belton* had been pushed too far.<sup>162</sup> Although *Thornton* did not overturn *Belton*, the writing was on the wall—or at least in Justice Scalia's concurrence—that the broad interpretation of *Belton*'s already-generalized rule was vulnerable.<sup>163</sup> There, Justice Scalia examined the search-incident doctrine as it had existed prior to *Chimel*.<sup>164</sup> Justice Scalia argued that the pre-*Chimel* search-incident doctrine clearly supported evidence gathering as a legitimate basis to search incident to arrest:

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.<sup>165</sup>

Rather than relying on *Chimel*'s generalized bases to search—which authorized police to perform a *Belton* search of the arrestee's vehicle in *every* case—Justice Scalia instead argued for a more privacy-protective approach that supported a *Belton* search *only* when a reasonable basis existed to believe that the arrestee's vehicle contained evidence of the crime of arrest.<sup>166</sup> According to Justice Scalia, “[i]f *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.”<sup>167</sup>

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162. Justice O'Connor provided the crucial fifth vote in *Thornton*. *Id.* at 625 (O'Connor, J., concurring).

163. See Leslie A. Shoebottom, *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny*, 79 TUL. L. REV. 365, 394–99 (2004) (anticipating *Gant*'s adoption of evidence-gathering basis to justify incident search of arrestee's vehicle, as well as *Gant*'s use of alternative holdings in authorizing evidence-gathering search).

164. See *Thornton*, 541 U.S. at 629–32 (Scalia, J., concurring).

165. *Id.* at 630.

166. See *id.*

167. *Id.* at 629.

*C. The Pendulum Swings Again: A Doctrine in Transition*

The criticisms voiced in *Thornton* set the stage for the Court's reconsideration of search-incident doctrine in *Arizona v. Gant*.<sup>168</sup> There, officers who were already aware that Gant's driver's license had been suspended observed Gant pull into the driveway of a house being investigated as a drug house.<sup>169</sup> Gant got out of his vehicle, shut the door, and approached the officers.<sup>170</sup> The officers met Gant about ten to twelve feet from his vehicle, arrested him for the driver's license violation, and placed him in handcuffs.<sup>171</sup> Gant and two other individuals who had been arrested at the scene for other crimes were secured in three separate squad cars. The passenger compartment of Gant's vehicle was then searched.<sup>172</sup> The officers found cocaine and a gun in Gant's vehicle, which Gant sought to suppress because: (1) he had been secured at the time of the *Belton* search and therefore could not have accessed the passenger compartment of his vehicle, and (2) he had been arrested for a traffic violation for which no evidence could have been present in his vehicle.<sup>173</sup> The Supreme Court granted certiorari, explaining that "[t]he chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles."<sup>174</sup>

Justice Stevens, writing for the majority, authored an opinion that clearly reflected the compromise required in obtaining *Gant*'s five majority-opinion votes. *Gant* set out two alternative holdings, one pertaining to *Belton* and the other authorizing the evidence-gathering search (with important modifications) that Justice Scalia argued for in his *Thornton* concurrence.<sup>175</sup> In the first of its alternative holdings, *Gant* rejected the broad, or generalized, view of the authority to perform a *Belton* search of a vehicle when the search was not supported by arrest-related exigency—those cases in which the arrestee was secured in the back of a squad car.<sup>176</sup>

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168. See *Arizona v. Gant*, 556 U.S. 332 (2009).

169. *Id.* at 335–36.

170. *Id.* at 336.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 338.

175. See *Thornton v. United States*, 541 U.S. 615, 630 (2004) (Scalia, J., concurring); see also *supra* notes 165–67 and accompanying text.

176. *Gant*, 556 U.S. at 343 (holding that “the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search”).

Importantly, *Gant* did not overrule *Belton*, finding instead that in “the rare case” where “an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains,” a *Belton* search is still available.<sup>177</sup>

In its other holding, *Gant* pressed evidence gathering as the primary basis for a vehicle search incident to an arrest of the vehicle’s recent occupant, explaining that “[a]lthough it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.”<sup>178</sup> Justice Scalia provided *Gant*’s crucial fifth vote in a concurrence that suggests *Belton* and *Thornton* could be on borrowed time.<sup>179</sup> As Justice Scalia explained, the truth behind “*Belton*’s fanciful reliance upon officer safety” was a “return” to the evidence-gathering searches that were permitted prior to *Chimel*.<sup>180</sup> The compromise nature of *Gant*’s majority opinion becomes fully apparent in Justice Scalia’s admission that he joined the majority only to avoid a “4-to-1-to-4 opinion” that would “leave[] the governing rule uncertain.”<sup>181</sup>

Justice Alito wrote a scathing dissent—in which three other Justices including the Chief Justice joined—which focused primarily on the majority’s de facto rejection of *Belton* and *Thornton* and the majority’s failure to justify its decision on stare decisis principles.<sup>182</sup> Importantly, Justice Alito criticized the majority’s reconfiguration of *Belton*, from determining whether

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177. *Id.* at 343 n.4. The *Gant* Court invalidated the incident search of *Gant*’s vehicle because law enforcement could not reasonably have believed that *Gant* could access his vehicle once he was handcuffed and secured in a squad car. *Id.* at 344.

178. *Id.* at 343 (internal quotation marks omitted) (citing *Thornton*, 541 U.S. at 632). Although *Gant* recognized the validity of an evidence-gathering incident search of an arrestee’s vehicle, the search of *Gant*’s vehicle, was rejected because no evidence of *Gant*’s crime of arrest—driving without a license—existed in *Gant*’s vehicle. *See id.* at 343–44 (“Because police could not reasonably have believed . . . that evidence of the offense for which [*Gant*] was arrested might be found [in his vehicle], the search in this case was unreasonable.”).

179. *Cf. id.* at 353 (Scalia, J., concurring) (“In my view we should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases.”).

180. *Id.*

181. *See id.* at 354. As Justice Scalia explained: “I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice Stevens.” *Id.* Because failing to limit *Belton* and *Thornton* represented the “greater evil,” Justice Scalia joined the majority. *Id.*

182. *See id.* at 358 (Alito, J., dissenting).



exigency existed at the time of the *arrest* to, instead, on whether exigency remained present at the time of the *search*.<sup>183</sup> Additionally, Justice Alito's criticism seemed to be directed at the majority's failure to finish the job, arguing that it made no sense to fundamentally alter *Belton* without also reconsidering *Chimel*, the case on which *Belton* relied—because *Belton* had taken its “timing” benchmark from *Chimel*.<sup>184</sup> By not reexamining *Chimel*, Justice Alito argued that *Gant* “leaves the law relating to searches incident to arrest in a confused and unstable state.”<sup>185</sup>

### III. *RILEY*'S IMPACT: BEYOND THE CELL PHONE CONTEXT

*Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search “incident to an arrest.” There has been a remarkable instability in this whole area, which has seen at least four major shifts in emphasis. . . . [R]apid reversals have occurred before, but they are rare.*<sup>186</sup>

*Riley* is deceptive. On the one hand, *Riley*'s categorical protection of cell phone data has been enthusiastically received.<sup>187</sup> And, the fact that *Riley* was one of the modern Court's rare unanimous decisions might suggest that *Riley*'s only potential controversy involves the decision's likely impact on law enforcement.<sup>188</sup> But *Riley*'s narrow view of what constitutes search-incident precedent is telling.<sup>189</sup> *Riley* represents more than a common sense cell phone privacy decision. Instead, *Riley* is a digital age reboot, reorganizing the search-incident doctrine into a singular *Chimel*-based rule that turns out to have a vehicle exception.

#### A. The Doctrinal Implications of Reconfiguring *Gant*

The *Riley* Court treated *Gant* as if it were nothing more than a limited evidence-gathering exception to the Fourth Amendment's

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183. *Id.* at 361–64. See *infra* note 199 and accompanying text (criticizing majority's use of a passenger-compartment limitation on its evidence-gathering search of an arrestee's vehicle).

184. *Gant*, 556 U.S. at 363.

185. *Id.*

186. *Chimel v. California*, 395 U.S. 752, 770–71 (1969) (White, J., dissenting).

187. See *supra* note 22.

188. See *Riley v. California*, 134 S. Ct. 2473, 2493 (2014) (“We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. . . . Privacy comes at a cost.”).

189. Cf. *id.* at 2484; see *supra* notes 17–20 and accompanying text.

warrant requirement—an exception that had nothing to do with *Chimel*.<sup>190</sup> Nothing could be further from the truth. In fact, *Gant* created a *hybrid* incident search—a search that was justified by evidence gathering, yet was limited in scope by *Chimel*’s arrest-related exigency concerns<sup>191</sup>—consistent with other incident searches that the Court upheld in the early years after *Chimel* was decided.<sup>192</sup> The hybrid nature of *Gant*’s evidence-gathering search was fully revealed in *Gant*’s explanation that, under its evidence-gathering holding, law enforcement could search “the *passenger compartment* of an arrestee’s vehicle and any containers therein”<sup>193</sup>—a limitation that *Riley* retained.<sup>194</sup> Therefore, ironically enough, *Riley* endorsed a *Chimel*-based limitation—the passenger compartment of the arrestee’s vehicle—while also deciding that *Gant*’s evidence-gathering search

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190. See *Riley*, 134 S. Ct. at 2484, 2492; see *supra* notes 26, 55–65 and accompanying text.

191. See *Arizona v. Gant*, 556 U.S. 332, 344 (2009) (majority opinion); cf. Eunice Park, *Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-To-Arrest Exception to the Cell Phone as “Hybrid”*, 60 DRAKE L. REV. 429, 479 (2012) (using “hybrid” to describe a cellular phone itself because cell phones have some characteristics of traditional containers but differ due to high expectation of privacy in information stored thereon).

192. See *supra* note 131 and accompanying text.

193. See *Gant*, 556 U.S. at 344 (emphasis added). In other words, *Belton*’s generalized limitation that incident searches of vehicles must exclude the vehicle’s trunk was *also* applied to *Gant*’s evidence-gathering search. Cf. *id.* (“An evidentiary basis for the search was also lacking in this case. . . . [because] *Gant* was arrested for driving with a suspended license—an offense for which police could not expect to find evidence *in the passenger compartment* of *Gant*’s car.” (emphasis added)). Cf. *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981); see *supra* note 155 and accompanying text.

194. See *Riley*, 134 S. Ct. at 2484 (describing *Gant* as adding “an independent exception for a warrantless search of a vehicle’s *passenger compartment* when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle” (emphasis added) (internal quotation marks omitted)). Importantly, *Gant*’s majority opinion also contained support for the view that its evidence-gathering search was *not* limited to the vehicle’s passenger compartment. See, e.g., *Gant*, 556 U.S. at 351 (holding that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the *vehicle* contains evidence of the offense of arrest” (emphasis added)); *id.* at 346 (same); *id.* at 343 (describing evidence-gathering search as *not* available “when a recent occupant is arrested for a traffic violation [because] there will be no reasonable basis to believe the *vehicle* contains relevant evidence” (emphasis added)). However, *Riley* ignored this potentially inconsistent authority in concluding that *Gant* imposed a passenger-compartment limitation on its evidence-gathering search.

was an “independent” exception—an exception that *Riley* seemingly separated from the search-incident doctrine itself.<sup>195</sup>

From a practical perspective, *Riley*’s apparent disconnection of *Gant* from the search-incident doctrine injects problematic instability into *Gant*’s evidence-gathering search. If *Gant*’s evidence-gathering search is truly independent of *Chimel*, then several questions flow from that vision of *Gant*. Left unresolved by *Riley* is whether an arresting officer who performs an evidence-gathering vehicle search under *Gant* should be permitted to search every item in the passenger compartment of the arrestee’s vehicle (a la *Belton*),<sup>196</sup> as opposed to searching only those items in the passenger compartment for which the officer has a legitimate basis to believe might contain evidence of the crime of arrest. In other words, when *Gant*’s evidence-gathering search is paired with *Belton*’s generalized scope rules, the resulting search of the vehicle’s passenger compartment might be more probing than what is supportable on the basis of suspicion alone.<sup>197</sup>

On the other hand, the scope of *Gant*’s hybrid vehicle search will sometimes be too narrow—since a legitimate basis to search for evidence of the crime of arrest (as contrasted with a *Chimel*-based search to look for weapons or destructible evidence) might, in an appropriate case, also extend to the vehicle’s trunk.<sup>198</sup> As Justice Alito argued in his *Gant* dissent, a passenger-compartment limitation simply had no relevancy to an evidence-gathering search of a vehicle:

Nor is it easy to see why an evidence-gathering search incident to arrest should be restricted to the passenger compartment. The *Belton* rule was limited in this way because the passenger compartment was considered to be the area that vehicle occupants can generally reach, but since the second part of the new rule is not based on officer safety or the preservation of evidence, the ground for this limitation is obscure.<sup>199</sup>

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195. *Riley*, 134 S. Ct. at 2484, 2492; see *supra* notes 26, 55–65, 194 and accompanying text.

196. *Cf. Belton*, 453 U.S. 454; see *supra* notes 150–55 and accompanying text.

197. See *People v. Nottoli*, 130 Cal. Rptr. 3d 884, 904 (Ct. App. 2011) (“A close reading of *Gant* makes clear that [the scope of] warrantless vehicular searches incident to arrest as established by *Belton* is unchanged.”).

198. *Cf. Gant*, 556 U.S. at 364 (Alito, J., dissenting).

199. *Id.* (citations omitted).

Apparently not satisfied with leaving the origin of *Gant*'s evidence-gathering vehicle search "obscure,"<sup>200</sup> *Riley* instead disconnected *Gant*'s two searches altogether—and did so on the basis of nothing more than the Court's own rhetoric.<sup>201</sup> Certainly, a passenger-compartment limitation was not what Justice Scalia had in mind in his *Thornton* concurrence.<sup>202</sup> There, Justice Scalia explained that an evidence-gathering incident search of a vehicle was justifiable if "the car might contain evidence relevant to the crime for which [the arrestee] was arrested."<sup>203</sup> The standard for such a search, Justice Scalia posited, was "reason[] to believe evidence relevant to the crime of arrest might be found in the vehicle."<sup>204</sup> Further, Justice Scalia's *Thornton* concurrence supported evidence gathering as a justification for incident searches based upon the lawfulness of the arrest,<sup>205</sup> without reference to the passenger-compartment limitation that *Riley* expressly embraced.<sup>206</sup> As Justice Scalia explained in *Thornton*:

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.<sup>207</sup>

Nothing about Justice Scalia's *Thornton* concurrence suggests that he favored limiting an evidence-gathering incident search of an arrestee's vehicle to the vehicle's passenger compartment. Yet, *Gant* seemingly imposed a definitional outer boundary—the vehicle's passenger compartment—on its evidence-gathering search of a vehicle incident to an arrest of the vehicle's occupant.<sup>208</sup> In describing its

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200. *Cf. id.*

201. *See Riley v. California*, 134 S. Ct. 2473, 2484 (2014); *see supra* notes 26, 57–59 and accompanying text.

202. *See Thornton v. United States*, 541 U.S. 615, 629–30 (2004) (Scalia, J., concurring).

203. *Id.* at 629 (emphasis added).

204. *Id.* at 632 (emphasis added).

205. *Id.* at 630.

206. *See Riley*, 134 S. Ct. at 2484 (quoting *Arizona v. Gant*, 556 U.S. 332, 343); *see supra* notes 26, 57–59, 194 and accompanying text.

207. *Thornton*, 541 U.S. at 630 (emphasis in original).

208. As *Gant* explained:

If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross* authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by Justice Scalia's opinion concurring in the

evidence-gathering search, *Gant* first endorsed the search that Justice Scalia advocated in *Thornton* but then recast it by distinguishing it from probable cause-based searches of vehicles.<sup>209</sup>

Because *Gant* distinguished its evidence-gathering search from a search performed under the automobile exception,<sup>210</sup> it is surprising indeed that *Riley* uncritically lumped those two searches together in its now-expanded view of the automobile exception.<sup>211</sup> *Riley*'s reconfiguration of *Gant* was not required to impose a warrant requirement on cell phone searches. The sui generis nature of electronic devices—based on their vast capability for storing personal information and the absence of danger to law enforcement—was a sufficient basis for treating cellular phones differently from conventional containers.<sup>212</sup> Considering the Court's repeated course changes in interpreting the search-incident doctrine,<sup>213</sup> the *Riley* Court's willingness to embroider this volatile warrant exception is risky. Going forward, pretending that *Gant*'s two searches do not *both* arise from the search-incident doctrine will mean, at the very least, that the *Chimel*-based limitations on *Gant*'s evidence-gathering search are vulnerable.

### *B. Restricting Gant's Evidence-Gathering Search to Vehicles*

*Riley* concluded that *Gant*'s evidence-gathering search was limited to incident searches of vehicles—and only vehicles.<sup>214</sup> As *Riley* explained, "*Gant* relied on circumstances unique to the

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judgment in *Thornton*, . . . *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader.

*Gant*, 556 U.S. at 347 (emphasis added) (citing *United States v. Ross*, 456 U.S. 798, 820–21 (1982)). But see *supra* note 194.

209. See *supra* note 208 and accompanying text.

210. See *supra* notes 208–09 and accompanying text.

211. Cf. *Riley*, 134 S. Ct. at 2492; see *supra* notes 26, 62–64 and accompanying text.

212. Cf. *Riley*, 134 S. Ct. at 2485, 2488–89 (treating a cellular phone as its own "category" of effects; rejecting government's argument that search of cell phone data was "materially indistinguishable" from incident search of "physical items," stating "[t]hat is like saying a ride on horseback is materially indistinguishable from a flight to the moon"); see *supra* notes 24–25, 52–54 and accompanying text.

213. See, e.g., *Chimel v. California*, 395 U.S. 752, 770–71 (1969) (White, J., dissenting); see *supra* text accompanying note 186. See also *United States v. Rabinowitz*, 339 U.S. 56, 67 (1950) (Black, J., dissenting), overruled by *Chimel*, 395 U.S. 752; see *supra* note 101 and accompanying text.

214. See *Riley*, 134 S. Ct. at 2484; see *supra* notes 62–64 and accompanying text.

vehicle context to endorse a search solely for the purpose of gathering evidence.”<sup>215</sup> Importantly, however, although *Riley* limited *Gant*’s evidence-gathering holding to vehicle searches, *Riley* was silent as to whether *Gant*’s first holding—*Gant*’s limitation of *Belton*—was applicable in non-vehicular cases.<sup>216</sup> After *Gant*, courts have increasingly been asked to do that very thing—to prohibit *Chimel* searches of the reaching distance of a pedestrian-arrestee or a person arrested at home, once that arrestee has been secured.<sup>217</sup> This argument certainly comes as no surprise to Justice Alito. As he predicted in his *Gant* dissent, there was simply “no logical reason” why *Gant*’s *Belton*-limitation—which bars police from performing an incident search once the arrestee is adequately secured—“should not [also] apply to all arrestees.”<sup>218</sup> And *Riley* will only increase this argument’s momentum. In concluding that *Chimel*’s two concerns were not legitimately present in cell phone searches,<sup>219</sup> *Riley* itself extended *Gant*’s *Belton*-limiting reasoning to a non-vehicular context.

For those who value *Chimel*, limiting *Gant*’s evidence-gathering search to incident searches of vehicles, as *Riley* has

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215. *Riley*, 134 S. Ct. at 2484 (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)) (internal quotation marks omitted).

216. See generally *id.* at 2484–86, 2492 (describing and treating *Gant*’s first holding—*Gant*’s limitation of *Belton*—separately from *Gant*’s evidence-gathering holding, explaining that “*Chimel* concerns for officer safety and evidence preservation underlie the search incident to arrest exception”).

217. Cf., e.g., *United States v. Shakir*, 616 F.3d 315, 317, 319 (3d Cir. 2010) (interpreting *Gant*’s limitation of *Belton* to require consideration of whether defendant—who was waiting in check-in line at hotel when arrested for a prior bank robbery—“retained sufficient potential access” at time of search to gym bag he had been carrying, despite being handcuffed and guarded by two officers; incident search of gym bag uncovered cash from bank robbery); cf. *Smallwood v. State*, 113 So. 3d 724, 727, 735, 740 (Fla. 2013) (invalidating incident search of cellular phone found on person of pedestrian-arrestee based, in part, on *Gant*’s *Belton* limitation because police “separated [the arrestee] from the phone by securing him in a police vehicle,” therefore “no issue existed with regard to officer safety or evidence preservation”); see generally Nicholas De Sena, Comment, *Searches Incident to Arrest and the Aftermath of Arizona v. Gant—A Circuit Split as to Gant’s Applicability to Non-Vehicular Searches*, 33 PACE L. REV. 431 (2013) (collecting post-*Gant* cases in which *Gant*’s *Belton*-limitation was extended to non-vehicular cases in prohibiting incident search of arrestee’s reaching distance once arrestee was adequately secured, as well as cases that refused to extend *Gant*’s *Belton*-limitation to non-vehicular cases).

218. Cf. *Gant*, 556 U.S. at 363–64 (Alito, J., dissenting) (arguing that *Gant* majority’s reorientation of *Chimel*—determining arrest-related exigency at the time of the search, not arrest—could not “logic[ally]” be limited to vehicle searches); see *supra* notes 182–185 and accompanying text.

219. See *supra* notes 41–54 and accompanying text.

done,<sup>220</sup> will, ironically enough, produce irreparable harm to *Chimel*. To explain, if *Gant* and *Riley*'s reasoning—that incident searches are not available unless *Chimel*'s concerns are legitimately present—is extended to all arrestees, police could be required to justify, on a case-by-case basis, performing a *Chimel* search of an arrestee's reaching distance once the arrestee is secured. And, in evaluating reaching-distance searches, courts will no doubt be asked to accept law enforcement's extravagant assessments of the danger posed by handcuffed arrestees, even those surrounded by several officers—all in an attempt to satisfy *Chimel*'s twin rationales.<sup>221</sup>

Practical problems will also result. If courts are required to ignore evidence gathering as an implicit motivation for a properly limited incident search—in favor of *Chimel*'s (and only *Chimel*'s) twin rationales—police might be tempted to *create* an exigency basis to search an arrestee's reaching distance by omitting security precautions that police would otherwise ordinarily take at an arrest scene.<sup>222</sup> Additionally, extending *Gant*'s limitation of *Belton* to non-vehicular cases will necessitate a case-by-case determination of whether arrest-related exigency remained present at the time of the *search*, not arrest<sup>223</sup>—a significant departure from the rules-oriented analysis that is this warrant exception's primary selling point.<sup>224</sup> If arrest-related exigency under *Chimel* dissipates (even in non-vehicular cases) once an arrestee is adequately secured, law enforcement could be required to obtain a warrant to search the arrestee's reaching distance or the items found therein—even if the search was both properly limited under *Chimel* and legitimately directed at uncovering evidence of the crime of arrest.<sup>225</sup>

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220. See *Riley*, 134 S. Ct. at 2492 (majority opinion); see *supra* notes 57–59 and accompanying text.

221. Cf., e.g., *United States v. Tejada*, 524 F.3d 809, 811–12 (7th Cir. 2008) (upholding search of entertainment center in arrestee's "tiny" apartment on basis of *Chimel*, even though arrestee was "[h]andcuffed, lying face down on the floor, and surrounded by police" because "police did not know how strong he was, and he seemed desperate"); see *supra* note 139 and accompanying text.

222. Cf. *Gant*, 556 U.S. at 362 (Alito, J., dissenting) (arguing that determining exigency at time of *search* would create a "perverse incentive" to leave arrestees unsecured, which would mean that "the law would truly be, as Mr. Bumble said, 'a ass'" (quoting *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996))).

223. See *supra* note 139 and accompanying text.

224. See, e.g., LaFave, *supra* note 141, at 141; see *supra* note 141.

225. See, e.g., *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010) (finding "no plausible reason" that *Gant*'s *Belton*-limitation should be confined to incident searches of vehicles "rather than [applying] in any situation where the item searched is removed from the suspect's control between the time of the arrest and the time of the search").

Instead, courts should *harmonize* the search-incident doctrine's historical evidence-gathering basis with *Chimel*'s bright-line rules establishing the search's scope in *all* incident searches,<sup>226</sup> not just vehicle searches incident to arrest under *Gant*. And, by recognizing evidence gathering of the crime of arrest as a legitimate basis in most cases to perform a properly limited *Chimel* search of an arrestee's reaching distance, courts can avoid what will otherwise be a debate about: (1) How secure is "secured"?; and (2) Did the arresting officer omit adequate security precautions in order to justify performing a *Chimel* search? Recognizing evidence gathering as an implicit search-incident motivation will prevent *Chimel*'s generalized rules from being "stretch[ed] . . . beyond [their] breaking point."<sup>227</sup>

*C. Procurement of Evidence: A Condition Precedent to Preservation*

One of *Chimel*'s twin concerns was based on the need for law enforcement to find and seize "any evidence on the arrestee's person in order to prevent its concealment or destruction."<sup>228</sup> Yet, to preserve evidence from destruction, the arresting officer must first find the evidence and remove it from the arrestee's control: procurement. In his *Riley* concurrence, Justice Alito recognized that an obvious condition precedent to preservation is removal of evidence from the arrestee's possession or control, thus eliminating the risk of destruction.<sup>229</sup>

Although Justice Alito did more in *Riley* than Justice Scalia, for example, to protect evidence gathering as a justification for incident searches,<sup>230</sup> Justice Alito's concurrence could be clarified

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226. Because the *Riley* Court treated cellular phones as a special "category of effects," this proposal would, of course, have no impact on incident searches of cellular phones. *Cf.* *Riley v. California*, 134 S. Ct. 2473, 2485 (2014); *see supra* notes 24–25, 52–54, 212 and accompanying text.

227. *Cf.* *Thornton v. United States*, 541 U.S. 615, 625 (2004) (Scalia, J., concurring).

228. *See Chimel v. California*, 395 U.S. 752, 763 (1969). But even *Chimel* contained language that supports evidence gathering as a justification in a properly limited search incident to arrest. *See supra* notes 125–30 and accompanying text.

229. *Riley*, 134 S. Ct. at 2496 (Alito, J., concurring) ("[O]nce [written] items [found on the person of the arrestee] are taken away from an arrestee (something that obviously must be done before the items are read), there is no risk that the arrestee will destroy them.").

230. Although Justice Scalia has argued that evidence gathering is a justification for incident searches more generally, he nevertheless joined the opinion of the Court in *Riley* without writing separately or joining Justice Alito's



to recognize the dual nature of the term, “preservation.” Justice Alito argued that officer safety and “evidence preservation” did not fully explain the justifications for the search-incident doctrine.<sup>231</sup> To expand on Justice Alito’s thoughts, “preservation” encompasses more than simply preventing the concealment or destruction of evidence. The term necessarily encompasses procurement of evidence (the first half of the act of “preserving”) as well as preventing the destruction or concealment of evidence (the second half of the act of “preserving”). After all, one cannot preserve what one has not procured.

Interestingly, an older cell phone case that upheld a warrantless cell phone search—of course, decided before *Riley*—contains an apt discussion of preservation. In *United States v. Finley*, law enforcement established a pre-*Riley* legitimate basis to search Finley’s cellular phone for evidence of the crime of arrest—conspiracy to sell methamphetamine.<sup>232</sup> Upon his arrest, Finley told the investigating agents that Brown, the other arrestee, had called him to request a ride to the truck stop in order for Brown to purchase cigarettes. Finley claimed, however, that he knew nothing of Brown’s plan to sell drugs at the truck stop.<sup>233</sup> Because Finley told the agents that he and Brown had communicated by phone to set up the ride to the truck stop, law enforcement had a legitimate basis—prior to *Riley*—to search Finley’s phone because there was reason to believe that evidence of the drug conspiracy might be found in the phone’s call log and text messages.

“Preservation,” as the term was used in *Finley*,<sup>234</sup> suggested a broader basis to search than would be supportable under *Riley*’s rigid interpretation of *Chimel*’s “destructibility” concern.<sup>235</sup> For the Fifth Circuit, “preservation” arguably meant nothing more than that law enforcement had “obtained” or “secured” the cell phone evidence for its eventual use at trial. In so saying, *Finley* clearly

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concurrence. Cf. *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) (arguing in a DNA case that “[t]he objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest”); see also *supra* note 165 and accompanying text.

231. *King*, 133 S. Ct. at 1989 (arguing that the seizure and removal of “written items” from the arrestee’s control, similar to the seizure of a cellular phone, dissipates *Chimel*’s twin rationales).

232. *United States v. Finley*, 477 F.3d 250, 255 (5th Cir. 2007).

233. *Id.*

234. See *id.*

235. See generally *Riley v. California*, 134 S. Ct. 2473, 2486–87 (2014); see *supra* notes 47–51 and accompanying text.

assumed that an evidence-gathering basis to search incident to arrest existed if the scope of that search was otherwise proper under the search-incident exception.<sup>236</sup> Although *Finley* framed its analysis in terms of *Chimel*-based cases, *Finley* was, in reality, a limited evidence-gathering search incident to arrest.

The point of harmonizing Justice Alito's concurrence and *Finley*'s interpretation of "preservation" is that an evidence-gathering rationale—in a properly limited search incident to arrest—exists independently of *Chimel* even though there is generally a confluence between the two concepts. Although *Chimel* is concerned with what an arrestee might do—injure an officer or destroy evidence—evidence gathering is concerned with what an officer might do: obtain probative evidence of the crime of arrest that could aid in the arrestee's conviction. The confluence exists by virtue of the manner in which the evidence is obtained—in response to an arrestee's actions or in furtherance of a conviction.

The fact that evidence gathering existed nearly 200 years before *Chimel* as a basis for a search incident to arrest lends further support to the notion that preservation first requires procurement. In other words, the search-incident doctrine has a tripartite basis: evidence gathering of the crime of arrest, officer safety, and preventing the destruction of evidence. Or, in short hand: procure, protect, and prevent. It just so happens that "preservation" in most cases encompasses both procurement and prevention—even though procurement has a historical pedigree that substantially antedates *Chimel*'s "prevention" annex to the search-incident doctrine.

#### IV. CONCLUSION

*The idea that officer safety and the preservation of evidence are the sole reasons for allowing a warrantless search incident to arrest appears to derive from the Court's reasoning in Chimel v. California . . . . As I have explained, Chimel's reasoning is questionable, and I think it is a mistake to allow that reasoning to affect cases like these that concern the search of the person of arrestees.*<sup>237</sup>

When *Chimel* was decided in 1969, the decision was seen as the cure for an unresolvable judicial ailment: establishing physical boundaries for premises searches incident to arrest. In *Chimel* and

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236. Cf. *Finley*, 477 F.3d at 259–61.

237. *Riley*, 134 S. Ct. at 2496 (Alito, J., concurring) (citations omitted).

the cases that generalized *Chimel*, the Court articulated bright-line search-incident rules that, although relying on *Chimel*'s twin concerns, never *excluded* evidence gathering as a legitimate motivation to search within an otherwise properly limited search incident to arrest. *Riley v. California*'s warrant requirement for cell phone searches resolved a number of problematic legal issues that had arisen in applying the Court's bright-line search-incident doctrine to a new technological device—cellular phones—searches that raised privacy concerns on a scale previously unknown in the pre-digital age.<sup>238</sup> Yet, just because *Riley* addressed a digital age problem does not mean that the *Riley* Court had carte blanche to ignore pre-digital age doctrine.

Although *Riley* appears to be a straightforward holding—cellular phones contain vast quantities of private information that cannot be searched incident to arrest absent a warrant—the path *Riley* blazed in reaching this outcome represents an important retcon of the search-incident doctrine. The “strife of *Riley*,” as suggested in this Article’s title, is that the *Riley* Court reshaped the search-incident doctrine, molding it into a *Chimel*-based rule that just so happens to have a vehicle exception.<sup>239</sup> *Riley* treated *Gant* as an outlier—an exception on wheels. Never mind that one of the driving forces behind *Gant* was Justice Scalia’s concurrence in *Thornton v. United States*<sup>240</sup>—a concurrence that relied on the search-incident doctrine’s historical basis as an evidence-gathering search, not a simple elaboration on the automobile exception. After *Riley*, evidence gathering seems to have been left in the dust—nothing more than a pit stop on the highway to a search-incident doctrine that is now based exclusively on officer safety and preventing the destruction of evidence. Only Justice Alito recognized the *Riley* Court’s error in excluding evidence gathering as a legitimate rationale in a properly limited search incident to arrest. And, judging from the ancient history of the search-incident doctrine and the consequences that *Riley*’s most recent doctrinal reorganization will have, Justice Alito was right.

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238. *Id.* See *supra* note 53.

239. *Riley*, 134 S. Ct. at 2484. See *supra* notes 57–59 and accompanying text.

240. 541 U.S. 615, 625–32 (2004) (Scalia, J., concurring). See *supra* notes 165–167 and accompanying text.